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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ABE SEROT,

PETITIONER,

V.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE TRIAL COURT (IN THIS CASE, THE UNITED STATES TAX COURT) RENDERED AN UNCONSTITUTIONAL ADVISORY OPINION BY INTERJECTING INTO AND DECIDING THE CASE ON AN ISSUE NEITHER RAISED NOR LITIGATED BY THE PARTIES?

2. WHETHER THE TRIAL COURT (IN THIS CASE, THE UNITED STATES TAX COURT) VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY PLACING UPON HIM THE BURDEN OF PROOF ON AN ISSUE WHICH, IF PROPERLY BEFORE THE TRIAL COURT, WAS APPROPRIATELY ON RESPONDENT?

3. WHETHER THE COURT OF APPEALS IN AFFIRMING THE TRIAL COURT RELIED UPON THE WRONG PROVISION OF THE INTERNAL REVENUE CODE?

LIST OF ALL PARTIES TO THE PROCEEDING

1. Petitioner, Abe Serot

2. Respondent, Commissioner of Internal Revenue Service

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PETITION FOR WRIT OF CERTIORARI

Abe Serot hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

Abe Serot v. Commissioner of Internal Revenue Service, T.C. Memo 1994-532 (October 24, 1994).

Abe Serot v. Commissioner of Internal Revenue Service, Nos. 95-7197 and 95-7198, Memorandum Opinion (filed December 5, 1995).

Abe Serot v . Commissioner of Internal Revenue Service, Nos. 95-7197 and 95-7198, Order denying Petition for Panel Rehearing with the Suggestion of Rehearing En Banc (February 5, 1996).

JURISDICTION

Jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on December 5, 1995 and that Court's Order of February 5, 1996 denying Petitioner's Motion for Panel Rehearing with the Suggestion for Rehearing En Banc is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Constitutional Provisions

1. United States Constitution, Article 3, Section 2

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United

States, and Treaties made, or which shall be made, under their authority.

2. United States Constitution, Amendment 5

No person shall ... be deprived of life, liberty or property without due process of law.

Federal Statutes

1. 26 U.S.C. §162(a)

In general. There shall be allowed as deductions all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

2. 26 U.S.C.§165(a)

General rule. There shall be allowed as a deduction any loss sustained during a taxable year not compensated for by insurance or otherwise.

3. 26 U.S.C. §165(c)

The limitation on losses of individuals. In the case of an individual, the deduction under subsection (a) shall be limited to: (1) losses incurred in trade or business.

4. 26 U.S.C. §166(a)(1)

General rule - Wholly worthless debts. There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

5. I.R.C. §172(a)

Deduction allowed. There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this

subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

6. I.R.C. §172(c)

Net operating loss defined. For purposes of this subtitle, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income. Such excess shall be computed with the modifications specified in subsection (d).

Tax Court Rules of Practice and Procedure

1. Tax Court Rule of Practice and Procedure 142(a)

Burden of Proof. a. General: The burden of proof shall be upon the petitioner except as otherwise provided by statute or determined by the court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in the answer, it shall be upon respondent.

STATEMENT OF THE CASE

In March, 1990, respondent, the Commissioner of Internal Revenue (hereinafter referred to as "Respondent"), issued Notices of Deficiency to Petitioner, Abe Serot (hereinafter referred to as "Petitioner"). In these Notices, respondent asserted deficiencies in Petitioner's federal income taxes for the years 1979 through 1982. Petitioner timely petitioned the United States Tax Court to review respondent's income determinations. In August, 1992, Respondent issued an additional Notice of Deficiency to Petitioner in which Respondent asserted deficiencies in Petitioner's federal income tax for the years 1985 and 1986. Petitioner again timely petitioned the United States Tax Court to review Respondent's determinations for those years.

Initially, Petitioner's cases were separately docketed by the United States Tax Court. In or about September, 1993,

however, the Tax Court consolidated the two (2) cases for trial, briefing and decision.

In his Petitions to the Tax Court, Petitioner essentially agreed with Respondent's income determinations for the tax years 1979 through 1982. Petitioner, who was in the business of lending money, did contest the conclusion that he owed additional taxes. Petitioner argued, and ultimately proved, that he incurred losses from his lending business which offset, to varying degrees, the income adjustments asserted by Respondent. Specifically, Petitioner claimed entitlement to theft and/or bad debt losses incurred during the years at issue which, if proven, essentially offset all of the adjustments made to his income by Respondent. Petitioner's entitlement to these offsetting losses turned on whether he was in the trade or business of lending money during the years in question.

Before the Tax Court, the parties raised, narrowed and litigated certain issues. These issues, however, were limited to the following: (1) whether Petitioner was in the trade or business of lending money; (2) whether Petitioner incurred deductible bad debt and/or theft losses in connection with that business; and (3) whether any losses proven by Petitioner were incurred during any of the tax years at issue.

These issues as defined by the parties were tried before the Tax Court in Philadelphia, Pennsylvania commencing on January 18, 1994. Thereafter, the parties filed extensive briefs. After the record was closed, the Tax Court decided all of the issues raised and litigated by the parties in a manner essentially favorable to Petitioner. The Tax Court's findings were set forth in a lengthy Memorandum of Findings of Facts and Opinion. 2-11/2-47. Thirty-four (34) pages of the Tax Court's thirty-seven (37) page Memorandum were directed to analyzing the issues raised and litigated by the parties. APP-11/APP-45. Specifically, the Tax Court held that Petitioner was in the trade or business of lending money during the years at issue and that in 1982 while conducting that business, he incurred business theft and bad debt losses totaling $368,935.

Although with these findings the Tax Court addressed and disposed of all the issues raised and litigated by the parties,

it went on to interject and to decide another issue. The Tax Court, sua sponte, determined that Petitioner could not deduct his proven losses against the income adjustments placed into issue by Respondent because Petitioner had failed to prove the income from his lending activity. APP-45/APP-47. This issue -- Petitioner's income from his lending business and its effect on his entitlement to deduct his established losses -- was never raised by either party to the litigation or by the Court at any time before, during or after trial, except in the last three (3) pages of the Tax Court's Opinion.

After denying Petitioner's Motion for Reconsideration, the Tax Court, on January 10, 1995, entered Decisions in favor of Respondent. APP-48/APP-49. Thereafter, on March 30, 1995, Petitioner timely sought review of the Tax Court's Opinion in the United States Court of Appeals for the Third Circuit. Because Petitioner had timely petitioned the Tax Court to review Respondent's erroneous determinations of deficiency concerning his federal income tax obligations for the years at issue, the Tax Court has subject matter jurisdiction pursuant to 26 U.S.C. §§6313(a) and 7442. Because Petitioner was a resident of Pennsylvania, appealing from an adverse decision of the Tax Court, by timely filing Notices of Appeal from the adverse decisions of the Tax Court, appellate jurisdiction and venue were properly vested in the United States Circuit Court for the Third Circuit pursuant to 26 U.S.C. §7482(a)(1) and (b)(1)(A).

After extensive briefing by the parties, the Court of Appeals, via a Memorandum Opinion filed December 5, 1995, affirmed the Tax Court. APP-1/APP-7. Also on December 5, 1995, the Third Circuit entered judgment affirming the Tax Court in all respects. APP-8/APP-9. In its Memorandum Opinion, the Court of Appeals held that based upon certain specific provisions of the Internal Revenue Code, Petitioner bore the burden of proving all his income from the lending activity before being entitled to deduct the clearly proven losses. Unfortunately, the Court of Appeals relied upon the wrong statute.

On January 19, 1996, Petitioner filed with the Court of Appeals a Petitioner for Panel Rehearing With a Suggestion of

Rehearing En Banc pursuant to F.R.A.P. 35 and 40. On or about February 5, 1996, the Third Circuit Court of Appeals denied Petitioner's Petition for Panel Rehearing. APP-10. Petitioner having exhausted all remedies available to him in the Courts below, hereby seeks this Court's intervention.

REASONS FOR GRANTING THE WRIT

1. The Trial Court (In This Case, The United States Tax Court) Rendered An Unconstitutional Advisory Opinion By Interjecting Into And Deciding The Case On An Issue Neither Raised Nor Litigated By The Parties.

Basic to our juris prudence is the notion that courts are not permitted to issue advisory opinions. Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 1950 n.14 (1968), citing, 3 H.Johnston, Correspondence and Public Papers of John J, II. 486-489 (1981). This rule against advisory opinions is based upon the Constitutional provision that:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority ...

United States Constitution, Article 3, Section 2, Clause 1.

In the present case, the Tax Court rendered an unconstitutional advisory opinion. As stated previously, the Respondent asserted deficiencies in the Petitioner's income for the years 1979 through 1982 and 1985 and 1986. The income adjustments at issue were essentially uncontested. Instead, Petitioner argued that he was entitled to offsetting deductions as a result of losses incurred in his money lending business.

Respondent answered Petitioner's allegations in the Tax Court by challenging whether he was in the trade or business of lending money. Alternatively, Respondent took the position that assuming Petitioner was in the trade or business, he failed to

substantiate the losses to which he had claimed entitlement. At no time during the pretrial, trial or post-trial briefing stages did either party raise the issue of whether Petitioner's entitlement to the deductions which he was claiming turned upon his proving additional income from his lending activities.

Since the issue of the income from Petitioner's lending activity was never raised by the parties in the trial court by addressing it and deciding the entire case based upon it, the Tax Court clearly rendered an unconstitutional advisory opinion.

Although the concept of advisory opinions is somewhat esoteric, it does come up in many contexts, one of which is a situation such as that presented here where a particular question has not been framed or illuminated by the parties, but has nonetheless been decided by the Court. United States v. Fruehauf, 365 U.S. 146, 157, 81 S.Ct. 547, 554 (1961); *see also*, Coffman v. Breeze Corps., 323 U.S. 316, 65 S.Ct. 298 (1991) (the court would not render advisory opinion in a suit by a patent licensor against its licensee to restrain payments of royalties to the government when the same questions are better presented in a suit for accounting).

Since the issue of the income from Petitioner's lending activity was never properly before the Tax Court, by deciding it, the Tax Court overstepped the boundaries of its judicial power and rendered an unconstitutional advisory opinion.

2. The Trial Court (In This Case, The United States Tax Court) Violated Petitioner'S Constitutional Right To Due Process Of Law By Placing Upon Him The Burden Of Proof On An Issue Which, If Properly Before The Trial Court, Was Appropriately On Respondent.

By deciding an issue never raised or addressed by Petitioner, the Tax Court violated Petitioner's rights to due process of law. It is axiomatic that issues should be litigated only with:

> that clear correctness provided when a question emerges precisely framed and necessary for decision from a class of adversary argument exploring every aspect of a multi-faceted situation embracing conflicting and demanding interests.

United States v. Fruehauf, 365 U.S. 146, 157, 81 S.Ct. 547, 554 (1961). There can be no question that the issue upon which the Tax Court ultimately decided the case, i.e., Petitioner's alleged failure to prove the income from his lending activity, was never raised or otherwise addressed by any party at any time during the trial court litigation. This was confirmed by the Court of Appeals in its decision.

Petitioner substantially prevailed on each and every issue that was raised and argued by the parties. Even though each issue raised and litigated by the parties was decided in Petitioner's favor, he ultimately lost the case because the Tax Court interposed a requirement that a taxpayer must prove all of the income from an activity before being entitled to deduct any losses incurred in that activity. Unfortunately, this requirement has neither basis in substantive tax law nor support in general principles of governing conduct of courts. In doing this, the Tax Court decided the case in a manner that was procedurally inappropriate and repugnant to the manner in which cases are litigated in the federal courts. In fact, the manner in which the Tax Court decided the case was clearly in conflict with its own rules of practice and procedure.[1] This concept of notice pleading is fundamental to federal court juris prudence. This is because the issues are to be framed on some certain point so that

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[1] The Tax Court's Rules of Practice and Procedure provide that Respondent bears the burden of proving any issues not raised in the initial pleadings. Tax Court Rule of Practice and Procedure 142(a). There is no question that neither party raised the issue of the income from petitioner's lending activities.

the parties may come prepared with their evidence and not be taken by surprise. Miner v. Mechanics' Bank of Alexandria, 26 U.S. 42 (1928).

By deciding the case as it did, the trial court deprived petitioner of due process of law.

3. The Court Of Appeals In Affirming The Trial Court Relied Upon The Wrong Provision Of The Internal Revenue Code.

As stated previously, the Third Circuit Court of Appeals affirmed the Tax Court's erroneous decision via a Memorandum Opinion filed on December 5, 1995. APP-1/APP-7. In affirming the Tax Court, the Court of Appeals sidestepped the significant constitutional and procedural issues raised by Petitioner in the Court of Appeals. Instead, the Third Circuit essentially affirmed the Tax Court on what might be called a statutory construction analysis. Unfortunately, in conducting its statutory construction analysis, the Court of Appeals applied an inapplicable provision of the Internal Revenue Code.

As was argued before the Tax Court and The Court of Appeals, substantive tax law does not require a taxpayer to first establish his income before being entitled to deduct business bad debt and theft losses. Internal Revenue Code §165 governs a taxpayer's entitlement to deduct business theft losses. Specifically, that statute states:

> There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

26 U.S.C. §165(a). With certain exceptions, the deductibility of losses under this section are limited to those incurred in a trade or business or in a transaction entered into for profit (as distinguished from a trade or business). 26 U.S.C. §165(c).

The trial court properly held that in 1982, Petitioner incurred a theft loss in the amount of $363,935 while conducting his money lending business. For Petitioner to be entitled to deduct this loss, he had to do no more than establish that he came within the terms of the provisions of the particular statute authorizing the loss. Bartlett v . Commissioner, 114 F.2d 634 (9th Cir. 1940); Meyer v. Commissioner, 243 F.2d 262 (8th Cir. 1957), cert. denied, 355 U.S. 862 (1957). In fact, even if this loss was not disadvantageous to Petitioner, provided that there was no sham transaction, and that the facts fit within the confines of the statute authorizing the deduction, Petitioner would have been entitled to its benefit. George Freitas Dairy, Inc. v. U.S., 582 F.2d 500 (9th Cir. 1978). There is nothing in 26 U.S.C. §165, the regulations promulgated thereunder, or the case law interpreting that statute (or its predecessor statutes) which requires, as a condition precedent to deducting business related theft losses, that a taxpayer first authoritatively establish the income from the trade or business in which the losses were incurred.

In addition to the $336,935 theft loss which the Tax Court found Petitioner had established, the Court also found that Petitioner had established a business bad debt loss incurred in 1982 in the amount of 1982 in the amount o $32,000. Internal Revenue Code §166 governs the deductibility of bad debts and, consequently, governs Petitioner's entitlement to deduct the $32,000 loss. That section states:

> There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

26 U.S.C. §166(a)(1). Non-corporate taxpayers are entitled to a bad debt deduction only for debts incurred in connection with the trade or business. 26 U.S.C. §166(d). Like with business theft losses, there is no authority to support the conclusion or inference that before a taxpayer can take advantage of a business related bad debt deduction, he must first prove the income from the business activity.

As stated previously, the Court of Appeals did not address Petitioner's substantial constitutional arguments because it held that Petitioner had failed to satisfy the statutory requirements entitling him to deduct the losses which he had clearly proven were incurred in his trade or business of lending money. Specifically, the Court of Appeals found that Petitioner:

> was required to prove that: (1) he was in the business of lending money; (2) during each of the years in issue, he incurred expenses in conducting his business that are allowable as deductions under the Code; and (3) the amount of such allowable business expenses exceeded his gross income from the business, resulting in a deductible net operating loss for each year. (citing 26 U.S.C. §§172(a) & (c)).

APP-6.

Obviously, the Court of Appeals relied upon 26 U.S.C. §172 in reaching the above-stated conclusion. Unfortunately, section 172 governs a taxpayer's entitlement to the deduction of net operating losses. Essentially, a net operating loss is a loss incurred in another tax year which is either carried back to prior tax years or carried forward to subsequent tax years. Internal Revenue Code §172 has absolutely nothing with a taxpayer's entitlement to deducting a loss during the year in which it is incurred. As stated previously, the theft and business bad debt losses at issue are governed by 26 U.S.C. §165 and §166, respectively.

Because the Third Circuit Court of Appeals clearly applied an incorrect statute, it is requested that this Court exercise its discretion review the record and opinions of the courts below.

CONCLUSION

For all of the above-stated reasons, it is respectfully requested that this Court exercise its discretion and grant certiorari in the above-captioned matter.

Respectfully submitted,

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Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-7197 and 95-7198

ABE SEROT,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE

On Appeal from the Commissioner of Internal Revenue
(Nos. 90-13904 and 92-25391)
Trial Judge: Honorable Howard A. Dawson, Jr.,
Tax Court Judge

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 1, 1995
BEFORE: MANSMANN and COWEN, Circuit Judges
and PARELL, District Judge*

(Filed December 5, 1995)

MEMORANDUM OPINION

COWEN, Circuit Judge.

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* Honorable Mary Little Parell, United States District Judge for the District of New Jersey, sitting by designation.

Petitioner Abe Serot brought this action in the United States Tax Court seeking to set aside deficiencies assessed both for his fraudulent failure to report foreign interest income on his 1979-82 tax returns and the disallowance of carryforwards for business bad debt and theft deductions reported on his 1985 and 1986 returns. While Serot does not deny that he failed to report foreign interest income for 1989-82, he contends that during these years, he was engaged in the trade or business of lending money and that his losses in this endeavor were substantial enough to offset any interest income that he failed to report.

The Tax Court found that Serot had maintained an off-the -books business of lending money at high rates of interest to poor credit risks. The court also found that Serot's financial records or loan agreements he consummated were sparse and poorly organized --at least for the loans with respect to which no deductible loss was claimed. Noting Serot's failure to keep adequate records and his inability to prove at trial that he had not profited from his money-lending operations, the Tax Court concluded that any attempt to determine Serot's gross income during this period would be a speculative exercise. Since gross income could not be determined with any degree of accuracy based upon the record before the Tax Court, the court concluded that Serot had failed to satisfy his burden of establishing a statutory entitlement to any offsetting deductions.

We agree with the Tax Court's holding that Serot was first required to provide adequate documentation of his gross income from his business of lending money in order to be eligible to obtain tax deductions for business theft and bad debt losses. Since Serot failed to make such a showing, we will affirm the Tax Court's denial of his petition.

I.

On March 28, 1990, the Commissioner of Internal Revenue ("the Commissioner") mailed Serot a notice of deficiency for the 1982 tax year. Serot's 1982 tax deficiency amounted to $67,428.00. Two days later, the Commissioner mailed Serot notices of deficiency for the taxable years 1979, 1980 and 1981. The amounts of the deficiencies for these years were $16,791.00, $40, 156.00 and $81,229.00, respectively.

These deficiencies all arose from Serot's unreported foreign interest income. The Commissioner also assessed additional penalties during each of these years (1979-82), based upon Serot's fraudulent concealment of income.

Serot never questioned the accuracy of the Commissioner's calculations of his unreported interest income. He has steadfastly maintained, however, that these gains should be offset against other unreported "losses" he incurred during this same period.

On June 26, 1990, Serot petitioned the Tax Court for a redetermination of the deficiencies that had been assessed for the 1979-82 tax years. On August 18, 1992, the Commissioner mailed Serot another notice of deficiency for the 1985 and 1986 tax years. This notice of deficiency disallowed carryforwards of bad business debt deductions that Serot had claimed on his 1985 and 1986 returns. The amounts of the deficiencies for 1985 and 1986 were $7,086.00 and $4,419.00, respectively. On November 16, 1992, Serot petitioned the Tax Court for a redetermination of the deficiencies assessed for 1985 and 1986.

On January 18, 1994, the Tax Court ordered that all Serot's pending matters be consolidated for trial, briefing and decision. On October 24, 1994, the court issued a memorandum decision regarding Serot's argument that he was entitled to offset the interest income he had received with his alleged business losses. Serot filed a motion for reconsideration with the Tax Court on November 23, 1994. On January 3, 1995, Serot's motion for reconsideration was denied. This appeal followed.

II.

Serot argues before this Court that the Tax Court's decision should be reversed on the following grounds: (1) the Tax Court decided the case against Serot by raising, sua sponte, an issue neither raised nor argued by the parties; i.e., whether Serot was entitled to deduct his lending losses without first substantiating the amount of income he received from his money-lending activity; (2) the Internal Revenue Code does not require a taxpayer to substantiate the amount of business income before being entitled to deduct bad business debt and theft

losses; and (3) even if Serot had the burden of proof and the record was insufficient to satisfy that burden, the Tax Court should be ordered to reopen the case to allow Serot to present additional evidence from which a determination in his favor can be made.

These arguments are without merit. Serot alleges that the issue of whether he could deduct his lending losses without first proving the amount of gross income he received from his money-lending activity was raised for the first time, and seemingly as an afterthought, on the final pages of the Tax Court's Decision and Order. Serot v. Commissioner, No. 95-1797-98, slip op. at 35-37 (T.C. Oct. 24, 1994). In essence, Serot is attempting to shift responsibility for his own failure to satisfy the applicable legal standard by blaming the government and the Tax Court for their neglect to tell him what the law is. Neither the government nor the Tax Court had an obligation to inform Serot of his apparent misconception. Furthermore, it is irrelevant whether the government or the court did or did not apprise Serot that this issue had to be resolved in order to decide his case. Such appraisal was the responsibility of Serot's trial counsel. It was incumbent upon Serot's counsel both to be aware of this issue and present evidence to establish the extent of Serot's gross income from his business of lending money.

The decision below is supported by basic, well-established principles of tax law, which require Serot to establish both that he was entitled to a deduction under a specific Code provision and the exact amount of the claimed deduction. As the Supreme Court has stated, "[w]hether and to what extent deductions are to be allowed depends upon legislative grace[,] and only as there is clear provision therefor can any particular deduction be allowed." New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1935). As the Court of Appeals for the Eleventh Circuit has observed, the taxpayer is at all times required to "come forward with evidence to support his entitlement to the deduction and the amount of that entitlement." Gatlin v. Commissioner, 754 F.2d 921, 923 (11th Cir. 1985).

To meet his burden, Serot was required to establish every necessary element of his claimed deduction. Haman v. Commissioner, 500 F.2d 401, 403 (9th Cir. 1974) (per curiam).

Accordingly, Serot was required to prove that: (1) he was in the business of lending money; (2) during each of the years in issue he incurred expenses in conducting his business that are allowable as deductions under the Code; and (3) the amount of such allowable business expenses exceeded his gross income from the business, resulting in a deductible net operating loss for each year. *See*, I.R.C. (26 U.S.C.) §§172(a) and (c).

Serot failed to satisfy this burden, even though he was given ample opportunity to make the required showing in the Tax Court.[1] The requirement that Serot keep and maintain records documenting the gross income he received from his business of lending money requires no more of him than the government demands of any other taxpayer. Because available financial records for Serot's lending business during the 1989-82 tax years do not present a clear picture of Serot's gross income, a fact attributable to Serot's neglect along, it was not possible for the Tax Court to make an accurate determination. Indeed, even Serot himself gave conflicting testimony in the Tax Court about the financial status of his money-lending business during these years.

If Serot does not know how much money he made or lost during these years for which deficiencies were assessed, it is unreasonable for him to expect the Tax Court not only to make a speculative assessment of his gross income based upon an inadequate factual record, but to find in his favor as well. Since Serot had a chance to, but did not, produce enough credible financial information about his money-lending business to be eligible to claim offsetting tax deductions, we conclude that the Tax Court did not abuse its discretion by refusing to reopen Serot's case in order to accept additional evidence or arguments.

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[1] Since we reject Serot's argument that this issue was not properly before the Tax Court, we necessarily reject his related arguments that the Tax Court rendered an unconstitutional advisory opinion and that the government waived this issue by not formally raising it.

We find the Tax Court's reasoning and analysis to be persuasive. Serot is entitled to no deduction for bad debt, theft or loss carryforwards for the tax years 1979-82 and 1985-86. The judgment of the Tax Court denying Serot's petition will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Robert E. Cowen
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7197 & 95-7198

ABE SEROT,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE

On Appeal from the Commissioner of Internal Revenue
No. 90-13904 & 92-25391
Trial Judge: Howard A. Dawson, Jr., Tax Court Judge

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 1, 1995
BEFORE: MANSMANN and COWEN, Circuit Judges]
and PARRELL, District Judge*

JUDGMENT

This cause came on to be heard on the record from the Commissioner of Internal Revenue and was submitted under Third Circuit LAR 34.1(a) on December 1, 1995.

On consideration whereof, it is now here ordered and adjudged that the judgment of the Tax Court Judge dated January 10, 1995, be and the same hereby is affirmed in all respects.

Costs taxed against appellant.

ATTEST:

/s/ P. Douglas Sisk
Clerk

December 5, 1995

Certified as a true copy and issued in lieu of a formal mandate on February 13, 1996

Teste: /s/ P. Douglas Sisk

Clerk, United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-7197 and 95-7198

ABE SEROT,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, Circuit Judges, and PARRELL*, District Judge

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision in this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted by the court en banc, the petition for rehearing is denied.

BY THE COURT:

/s/ Robert E. Cowen
Circuit Judge

Dated: February 5, 1996

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* As to panel rehearing.

T.C. Memo. 1994-532

UNITED STATES TAX COURT

ABE SEROT, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 13904-90, 25391-92 Filed October 24, 1994

Mark E. Cedrone, for petitioner.

Michael P. Corrado and Ruth Spadaro, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

DAWSON, Judge: These consolidated cases were assigned to Special Trial Judge Daniel J. Dinan pursuant to section 7443A(b) and Rules 180, 181, and 1983.[1] The Court agrees with and adopts his opinion which is set forth below.

OPINION OF THE SPECIAL TRIAL JUDGE

DINAN, Special Trial Judge: Respondent determined deficiencies in petitioner's Federal income taxes and additions to tax in docket No. 13904-90 as follows:

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the taxable years in issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

Year	Deficiency	Sec. 6653(b)*
1979	$ 16,791	$ 8,395
1980	40,156	20,078
1981	81,299	40,649
1982	67,428	33,714

*The fraud addition to tax for 1982 is codified under sec. 6653(b)(1) and (2).

Respondent determined deficiencies in petitioner's Federal income taxes in docket No. 25391-92 as follows:

Year	Deficiency
1985	$ 7,086
1986	4,419

After petitioner's concessions,[2] the issues for decision are: (1) Whether petitioner's two wholly owned corporations, Lauren Beth, Inc., an Living Better, Inc., should be disregarded for Federal income tax purposes; (2) if such corporations should be disregarded, whether petitioner was in the trade or business of lending money; (3) whether petitioner incurred business bad debt losses in the years 1979 through 1982; (4) whether petitioner incurred theft losses in 1982; and (5) whether petitioner's alleged losses in the years 1979 through 1982 are sufficient to offset his income for those years.[3]

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[2] Petitioner concedes that he failed to report interest income for the years 1979 through 1982 in the amounts of $36,066, $72,077, $131,492, and $137,077, respectively. He also concedes that he is estopped from denying fraud for the years 1979 through 1982 because of a prior criminal conviction for those years.

[3] The deficiencies for the years 1985 and 1986 relate solely to respondent's disallowance of a claimed net operating loss carry forward from 1982 related to petitioner's lending activities.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulations of fact and attached exhibits are incorporated herein by this reference. Petitioner resided in Bala Cynwyd, Pennsylvania, at the time the petitions were filed in these cases.

Petitioner's lending activities and his investment activities were interrelated; however, for convenience, we will discuss the activities separately.

1. Lending Activities

Petitioner, as he admitted, was a "lender * * * of last resort." Petitioner would lend money to those unable to obtain a loan from a bank or other regular financial institution. Petitioner made what would be considered high-risk loans. He charged an interest rate and a service fee for which he determined to be commensurate with such risk. Interest rates charged by petitioner varied from the then-current prime rate to cover 1 percent a day, and service fees frequently equaled 10 percent of the total amount of the loan.

Petitioner did not advertise his lending services to the general public. However, his particular lending services were throughout the local financing community. Petitioner commonly received referrals from bank officers and employees of title companies. Mr. Berk, petitioner's long-time friend and attorney, recommended clients to him. On many occasions, petitioner made loans to persons brought to him by a "bird-dogger", the slang name for an individual who was paid a commissioner for arranging difficult financing.

At the time of trial, petitioner was 70 years old. He had been lending money since the early 1950s. Shortly after World War II, petitioner became actively involved in the acquisition and sale of low-priced real estate in and around the Philadelphia, Pennsylvania area. Petitioner's involvement with low-priced real estate, on occasion, put him in contact with individuals in need of short-term loans who were willing to pay above-market interest rates. Petitioner discovered that making such loans could be very lucrative, provided the amounts lent could be

collected.

Most lending by petitioner was actually conducted through his two wholly owned corporations, Lauren Beth, Inc. (Lauren Beth),[4] and Living Better, Inc. (Living Better). In 1966, petitioner incorporated Lauren Beth in Pennsylvania, and in 1970, petitioner incorporated Living Better, also in Pennsylvania. From their inception, neither Lauren Beth nor Living Better ever filed a Federal income tax return. Between 1979 and 1982, Lauren Beth and Living Better filed Pennsylvania corporate tax returns claiming to be inactive and paid a $10 self-assessing Pennsylvania capital stock tax.[5] Lauren Beth and Living Better have never issued stock, held board meetings, elected officers, or observed other corporate formalities. Neither corporation has ever had an address other than petitioner's home address; on corporate letterhead and checks, petitioner referred to his apartment number as a suite number. Neither corporation has ever had a telephone number other than petitioner's personal telephone number. Petitioner paid personal expenses from corporate accounts and corporate expenses from his personal accounts.

During the years in issue, the corporations had separate bank accounts. Petitioner generally would lend money from one of the corporate accounts. Living Better maintained a corporate bank account at Industrial Valley Bank (IVB) while Lauren Beth maintained a corporate account at Fidelity Bank. There was no business reason why a loan was made from one corporate account as opposed to the other corporate account. At trial petitioner introduced into evidence approximately 71 separate loan files spanning the years 1973 through 1986. The records show that from 1976 through 1984, approximately 53 different loans were made either by petitioner, Lauren Beth or Living Better.

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[4] The corporation was named after petitioner's only daughter, Lauren Beth Serot.

[5] It is unclear whether the corporations filed inactive State returns in earlier years.

In all instances the loans were made to persons or entities unrelated to petitioner. In most instances, the loans were secured by a mortgage on real estate or a judgment note. The loans ranged in value from a few thousand dollars to over $100,000. Approximately one-half of the loans are for amounts exceeding $100,000. The total amount of money lent approximated $1,200,000. Petitioner and the borrower rarely entered into a loan agreement. In most cases the terms of the loan can only be determined by reference to the security, i.e., a mortgage or judgment note. Almost all of the loans are for periods of 6 months or less.[6]

Petitioner, Lauren Beth, and/or Living Better, may have, and most likely did, make other loans in addition to those mentioned above. It is also quite possible that some of the information in petitioner's loan files is erroneous. The loan records submitted by petitioner were generally disorganized. They were not organized by amounts, years, or borrowers. From each loan file it is virtually impossible to determine: Who made the loan (Lauren Beth, Living Better, or petitioner); the interest rate; the length of time of the loan; the repayment terms; the service fees; the security, if any; and, more importantly, the ultimate disposition of the loan. This is not to imply that all of the loan files are missing all of the above-listed information, but that many of the loan files are lacking some of the information.

Petitioner also failed to maintain, or, at least, to submit at trial, comprehensive books or records of his lending activities. As petitioner admitted, from the 71 loan files submitted at trial, the income he earned on the loans during 1979 through 1982 simply cannot be determined. Petitioner opined, however, that the loans were very profitable.

Petitioner has not shown that he reported any income from his lending activities on his Federal income tax returns

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[6] In 1984, petitioner also entered into an accounts receivable factoring relationship with Yellow Limousine Services, petitioner would advance funds against Yellow's accounts receivable. As Yellow received payments on the accounts receivable, it was responsible for transferring such payments to petitioner.

from 1979 through 1982.

Petitioner made loans, other than those discussed above, between 1979 and 1983, for which there is significantly better documentation and from which petitioner claims large losses.

Each of these loans, or series of loans, will be discussed separately.

a. Tuchinsky Loans

Beginning in 1979 and continuing until late 1982, Lauren Beth advanced $132,599 to a number of different corporations controlled by or related to Arthur Tuchinsky (corporate loans).[7] Apparently, the loans were for corporations that Mr. Tuchinsky was attempting to organize. Mr. Tuchinsky claimed to have been the owner of or involved in over 18 different corporations as of October, 1981.

Each loan was made out either to the corporation receiving the loan or to a corporate officer of the corporation receiving the loan or for use by the corporation. As security for the loan, petitioner would receive stock in the corporation receiving the loan, or stock in another corporation owned by Mr. Tuchinsky. No formal loan documents were drawn up for any of the loans. Petitioner recalled that the interest rate on the loans varied from a minimum of 2 percent a month and up. The vast majority of Mr. Tuchinsky's corporations failed.

In August 1982, Market Management (MM), a corporation controlled Mr. Tuchinsky, paid $24,200 to Lauren Beth. In 1984, Mr. Tuchinsky informed Internal Revenue Service Special Agent Walker, who was conducting a criminal

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[7] Petitioners provided to Tuchinsky's corporations the following amounts:

Year	Amount
1979	$10,000
1980	8,250
1981	94,729
1982	19,620

investigation of petitioner, that his records indicated that between 1979 and late 1982 he repaid $102,679 to petitioner or his corporations. This amount did not include the 1982 MM payment.

During the same years, Lauren Beth also advanced approximately $170,366 to Mr. Tuchinsky personally.[8] As before, no formal loan documents were drawn up for any of the personal loans. For the personal loans, petitioner did not require security. Petitioner claimed Mr. Tuchinsky never repaid the loans made to him.[9]

In April, 1989, Mr. Tuchinsky, in a letter to petitioner, listed the outstanding loan balance due petitioner, and his estimate of the value of collateral held by petitioner.[10] Mr. Tuchinsky stated that the loan balance was $490,000, exclusive of service and interest charges. Mr. Tuchinsky estimated the market value of collateral held by petitioner to be $187,000. In particular, Mr. Tuchinsky stated that petitioner owned stock in

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[8] The following amounts were loaned to Mr. Tuchinsky personally during 1979 through 1982:

Year	Amount
1979	$ 6,500
1980	14,500
1981	98,766
1982	50,600

[9] Until Mr. Tuchinsky's death on May 9, 1990, petitioner considered the personal loans to be collectible. Petitioner stated he presumed that at some point in time Mr. Tuchinsky would repay the amount owed.

[10] The letter is directed to petitioner and refers to the outstanding balance due from Mr. Tuchinsky as being owed to petitioner. It is unclear whether the outstanding balance includes personal loans, as the amount claimed to be owed by Mr. Tuchinsky is greater than the amount that petitioner claimed Mr. Tuchinsky owed him.

Amglo Industries worth $37,000, part of Gulf Port Films worth $140,000 (there was no value for the stock), and other miscellaneous stock worth $10,000. In March, 1989, petitioner sold his stock in Amglo Industries for $56,980. Petitioner still owns the stock in Gulf Port Films and the miscellaneous stock referred to in the letter.

On January 28, 1990, Mr. Tuchinsky signed an affidavit regarding the ultimate disposition of the corporate loans. The affidavit included a schedule of the corporate loans, the date the funds were borrowed, the amount borrowed, and the year the entity ceased doing business.[11] Mr. Tuchinsky stated in the affidavit that five of his corporations, which had received $64,229, failed in 1981, two of his corporations, which had received $10,420, failed in 1982.

On January 30, 1990, Mr. Tuchinsky signed a revised affidavit. The revised affidavit was identical to the first affidavit in all respects except that it included additional information on other corporate loans. The revised affidavit corresponds directly with checks written from Living Better to entities controlled or owned by Mr. Tuchinsky, which were introduced into evidence. The revised affidavit stated that one of his corporations, which had received $10,000, failed in 1979, six of his corporations, which had received $100,479, failed in 1981, and two of his

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[11] The affidavit included the following information:

Corporate Name	Loan Date	Amount	Failure Year
Turning Basin, Inc.	2/08/80	$ 4,000	1981
Turning Basin, Inc.	3/09/81	17,000	1981
Carpet Buyers, Inc.	5/26/81	20,000	1981
Blue Mountain Exp.	8/10/81	8,629	1981
OCS Recovery Systems	8/13/81	10,000	1981
Guardian Inv. Corp.	8/14/81	4,600	1981
Willowick Management	6/14/82	6,420	1982
Morbet Management Corp.	7/19/82	4,000	1982

corporations, which had received $22,120, failed in 1982.[12]

b. Controlled Sanitation Loan

On March 3, 1975, Lauren Beth signed an agreement with Controlled Sanitation Corp. (Control) which provided that Lauren Beth would advance to Control over time approximately $100,000. The agreement was secured by a judgment obtained by Control against the International Association of Machinists and Aerospace Workers, which had previously been assigned to

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[12] The revised affidavit added the following information:

Name	Loan Date	Amount	Failure Year
Veronics, Inc.	1/05/79	$ 4,000	1979
Veronics, Inc.	1/25/79	6,000	1979
Turning Basin, Inc.	2/06/80	4,250	1981
Turning Basin, Inc.	4/20/81	8,000	1981
Turning Basin, Inc.	4/24/81	6,000	1981
Turning Basin, Inc.	7/10/81	6,500	1981
Best Energy Systems, Inc.	8/14/81	5,000	1981
Turning Basin, Inc.	10/05/81	3,500	1981
Turning Basin, Inc.	10/07/81	3,000	1981
Market Management, Inc.	10/31/81	2,500	1982
Market Management, Inc.	5/17/82	3,000	1982
Market Management, Inc.	6/14/82	3,700	1982
Market Management, Inc.	7/19/82	4,000	1982
Market Management, Inc.	8/30/82	2,500	1982

Morbet Management Corp. was not listed on the revised affidavit.

the Southeast National Bank.[13] Pursuant to the agreement, Control instructed the law firm in charge of collecting the judgment, Morgan, Lewis & Bockius (Morgan), to distribute any surplus of moneys available in the account at the bank resulting from collection of the judgment after Control's obligation to the bank had been satisfied, to Lauren Beth. Ultimately petitioner advanced $32,000 to Control pursuant to the agreement.

Due to an error by a Morgan associate, no funds were ever distributed to Lauren Beth. Petitioner did not attempt to collect from Control, reasoning that to do so would be futile. Petitioner provided no explanation as to why he considered that any attempt to collect from Control would be futile.

Instead, petitioner filed suit against Morgan in the Court of Common Pleas of Montgomery County. On January 17, 1980, petitioner's case against Morgan was dismissed. Petitioner appealed the dismissal to the Pennsylvania Superior Court. On or about March 28, 1982, the Pennsylvania Superior Court affirmed the Court of Common Pleas' Order of Dismissal. Petitioner then submitted an application for reargument, which was denied. Finally, petitioner filed a petition for review to the Pennsylvania Supreme Court. In October 1992, the Pennsylvania Supreme Court denied the petition.

c. Lipschutz Loans

In 1979 or thereabouts, William Richman, a "bird-dogger" often used by petitioner, introduced him to Leonard Lipschutz. When petitioner first met Mr. Lipschutz, he was the president and owner of Pulmonary Equipment Rental Corp. (PERC). PERC was in the business of leasing medical

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[13] Petitioner became involved in the loan through a referral by Herbert Bagley, a loan officer at Southeast National Bank. Mr. Bagley referred clients to petitioner when the bank was unable to make the individual or entity a loan. In the early 1980s, Mr. Bagley was investigated for banking law violations. In connection with that investigation, Mr. Bagley referred the Government investigators to petitioner for possible income tax violations.

equipment, primarily life-support systems, to medical facilities throughout the eastern seaboard. Mr. Lipschutz sold his interest in PERC about August 1981, but continued to act as PERC's president. It is unclear whether petitioner was aware of Mr. Lipschutz' sale of his interest in PERC.

Mr. Lipschutz informed petitioner that he was interested in expanding PERC's leasing operation, but, in order to do so, the corporation needed financing. Petitioner agreed to lend money so that Mr. Lipschutz or PERC could purchase equipment to be leased. As security for the loans, petitioner was to receive an assignment of the leases or ownership of such equipment.[14]

On February 4, 1980, Mr. Lipschutz received $16,200 from Living Better. The loan was purportedly secured by an assignment of a lease of three respirators to the Richmond Memorial Hospital. The loan was to be repaid in 36 monthly payments of $875, for a total payment of $31,500. Mr. Lipschutz made 15 payments on the loan, $13,125. In August 1980, petitioner purportedly received an assignment of a lease from St. Mary's Hospital signed by an employee by the name of C.C. Kurtz. It was later discovered that this individual did not exist.

In September 1980, Mr. Lipschutz and Linda Lipschutz, his spouse, received $9,820 from Living Better. The loan was secured by a mortgage on the Lipschutzes' personal residence in the name of Living Better. Mr. Lipschutz defaulted on the mortgage. Petitioner never foreclosed on the property. Mr. Lipschutz no longer lives in the home.

Between January 1, 1981, and July 20, 1981, Mr. Lipschutz received $35,000 from Living Better. On March 2, 1981, $41,990 was wired from Living Better to Oxymed, Inc.,

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[14] At the end of 1979, there is evidence that Mr. Lipschutz already owed petitioner $7,320. In January 1981, Mr. Lipschutz gave Living Better a check in the amount of $7,320.1 The check was returned for insufficient funds. Considering petitioner's interest rates, there is no way of determining the amount of the loan.

for the purchase of four "Bear I" ventilators for PERC. The invoice listed Living Better as the purchaser of the units.

On July 21, 1981, the Living Better account was credited in the amount of $35,000. The credit slip indicates that the credit was a payment on the Lipschutz loan. Between July 28, 1981 and October 27, 1981, Mr. Lipschutz received $71,300 through eight advances from Living Better.

On October 30, 1981, Mr. Lipschutz signed a judgment note in which he agreed to pay $137,894 to Living Better on or before November 22, 1981. In return for the note, Mr. Lipschutz received $20,000 from Living Better. The note provided that if payment was not made by the due date, interest would accrue at the rate of 1 percent per day. Mr. Lipschutz did not make any payment by the due date.

Approximately one month later, on November 24, 1981, Mr. Lipschutz executed a second judgment note in which he agreed to pay $179,494 to Living Better on or before December 10, 1981. Upon signing the note, Mr. Lipschutz received another $20,000 from Living Better. Again, Mr. Lipschutz did not pay by the due date.

On May 3, 1982 and June 1, 1982, petitioner gave Mr. Lipschutz certified checks drawn on his account at Bank Hapoalim in the amounts of $20,000 and $50,000, respectively. On June 4, 1982, Mr. Lipschutz received another $7,500 from Lauren Beth.

During the first week of July, 1982, petitioner deposited checks for $63,750 and $20,000 from Mr. Lipschutz into the Lauren Beth account. At first the checks were not honored, but on the second attempt they were honored.

On July 6, 1982, Mr. Lipschutz signed a no-interest $144,000 demand note payable to Lauren Beth. As part of this loan transaction, Mr. Lipschutz entered into an agreement with Lauren Beth which provided that Mr. Lipschutz was to lease 12 respirators from Lauren Beth for $12,000 a month for 12 months. On the same day, Mr. Lipschutz received another $87,000 from Lauren Beth. Mr. Lipschutz made no payments

on the demand note, nor did he make any payments pursuant to the lease.

On August 17, 1982, Mr. Lipschutz received $25,000 from Lauren Beth. One week later, Mr. Lipschutz received another $25,000 from Lauren Beth.

On September 30, 1982, Lauren Beth signed an agreement in which Lauren Beth purchased from Mr. Lipschutz all his interests in certain personal property listed in an attached schedule for the sum of $1. The schedule attached to the agreement listed 65 respirators by serial numbers. Of the 65 listed respirators, 25 were duplicate listings of the same serial numbers, and 12 were respirators that Lauren Beth was actually leasing to Mr. Lipschutz, according to the July 1982 agreement.

In October 1982, Mr. Berk, for the first time, began filing security interests on all personal property owned by Mr. Lipschutz. For reasons unstated, in connection with the filing of the security interests, Mr. Berk became concerned about the actual. existence of the equipment and the leases reportedly owned or assigned to petitioner by Mr. Lipschutz. On October 25, 1982, petitioner gave Mr. Lipschutz another $40,000 from his account at Bank Hapoalim.

During the next month or so, Mr. Berk made inquiries of the various medical. facilities that Mr. Lipschutz indicated were leasing equipment from him or PERC. Mr. Berk also made inquiries of the manufacturer of some of the respirators, Puritan-Bennett Corp. (Puritan), as to whether Puritan had actually manufactured respirators with serial numbers the same as those listed on the September 30, 1982 agreement. Mr. Berk also began a belated investigation into the financial situation of Mr. Lipschutz.

By the end of 1982, Mr. Berk had discovered that all the respirators, which petitioner believed he had owned, either did not exist, were owned by other entities, or were already fully

collateralized by others.[15] With respect to the leases assigned to petitioner, Mr. Berk discovered that they were all fraudulent.[16] Mr. Berk also discovered that Mr. Lipschutz was an alcoholic, a compulsive gambler, a manic depressive, and, in his view, judgment proof. At the end of 1982, Mr. Lipschutz stated that he was destitute and estimated his gambling debts at approximately $1 million.

Petitioner did not pursue criminal charges against Mr. Lipschutz. Rather, on February 6, 1983, Mr. Berk required Mr. Lipschutz to sign an agreement in which he stated that he owed Lauren Beth $415,000. Under the agreement, Mr. Lipschutz was to pay Lauren Beth the sum of $2,500 per month, and, if Mr. Lipschutz were to regain control of PERC, he was to cause PERC to guarantee the loan. When the agreement was signed, Mr. Berk advised that such an agreement would be a good precaution in the unlikely situation where Mr. Lipschutz might come into any significant amount of money. When Mr. Lipschutz defaulted on the note, petitioner did not attempt to collect. In a letter dated February 8, 1983, Puritan confirmed that seven respirator serial numbers were fraudulent.

Petitioner's involvement with Mr. Lipschutz did not end with the signing of the February 1983 agreement. In April or May of 1983, Mr. Lipschutz contacted Mr. Berk and informed him that he was due money as a result of an accident and that he would be willing to repay petitioner some of what he owed him. Mr. Lipschutz explained to Mr. Berk that the funds from the accident were only payable in the form of a certificate of deposit (CD) and that he would be willing to have petitioner stated as the owner of the CD in exchange for immediate cash.

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[15] In 1983, the Bear I ventilators purchased from Oxymed were listed as assets of Medical Rental Co. (MRC), a subsidiary of PERC. Mr. Lipschutz did not have an interest in MRC in 1983.

[16] On November 29, 1982, St. Mary's Hospital informed Mr. Berk that no person by the name of C.C. Kurtz had ever been associated with the hospital.

A day or so later, Mr. Lipschutz visited Mr. Berk at his office and brought with him a $75,000 CD from the Philadelphia Savings Fund Society (PSFS) payable to petitioner 91 days from issuance. Mr. Berk called PSFS and verified that a $75,000 CD was issued by PSFS in the name of petitioner. Mr. Berk then contacted petitioner, who agreed to purchase the CD from Mr. Lipschutz. Using Mr. Berk as a middle man, Mr. Lipschutz received from Lauren Beth $11,000 and, 4 days later, $26,000. The difference between the $75,000 and the $37,000 advanced was to be petitioner's profit on the near 90-day loan.

Mr. Lipschutz returned to Mr. Berk on three other occasions. On each occasion, Mr. Lipschutz had a 90-day or so CD from a different bank that was made payable to petitioner: A $50,000 CD from Home Unity Savings; a $25,000 CD from Trevose Bank; and a $75,000 CD from Germantown Savings Bank. Against these three CDs, Mr. Lipschutz received $30,000, $17,200, and $40,200. In all, Mr. Lipschutz received $124,400 against CDs with a reported value of $225,000.

When petitioner attempted to redeem the CDs, he discovered that they were all fraudulently obtained and, accordingly, worthless. Mr. Lipschutz had a purchased the CDs with checks drawn on accounts with insufficient funds. Again, petitioner did not file criminal charges or attempt to collect from Mr. Lipschutz.

In summary, petitioner or his corporations advanced Mr. Lipschutz the following amounts between the years 1981 and 1983:

Year	Amount
1980	$ 28,020
1981	188,290
1982	254,500
1983	124,400

On or about January 26, 1984, Mr. Lipschutz and his wife instituted a bankruptcy proceeding. Petitioner did not file a proof of claim in the bankruptcy proceeding.

2. Investment Activities

In addition to lending money, petitioner used Living Better to purchase IVB commercial paper and Eurodollars. [17] Apparently, IVB did not issue a Form 1099 with regard to the purchase of IVB commercial paper or Eurodollars in an amount that exceeded $100,000. Accordingly, investments by Living Better in IVB commercial paper or Eurodollars were for $100,000 or more. From such investments, during 1979 and 1980, Living Better earned $36,066 and $55,727, respectively, in interest income.

In October 1980, petitioner opened a joint bank account at the Philadelphia Branch of Bank Hapoalim in the name of Abe Serot and Lauren Beth Serot (Abe-Lauren account).[18] Bank Hapoalim is an international bank that is based in Tel Aviv, Israel, and has branches in many parts of the world, including the Cayman Islands. During October 1980, petitioner transferred $750,000 from Living Better into the Abe-Lauren account at Bank Hapoalim. In May 1982, petitioner deposited another $250,000 into the account from unknown sources.

On May 4, 1981, petitioner opened a different account at Bank Hapoalim in the name of petitioner and Sylvia Serot, petitioner's spouse (Abe-Sylvia account).[19] The next day, petitioner deposited $25,000 into the account, $5,000 of which

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[17] The IVB account was opened on the recommendation of Mr. Bagley who had left Southeast National Bank.

[18] Lauren Beth Serot did not file income tax returns for the years 1979 and 1980. She did file returns for the years 1981 and 1982, but did not report any of the interest from IVB or Bank Hapoalim in either year.

[19] Sylvia Serot filed separate Federal income tax returns for the years 1979 through 1982. She did not report any of these interest income from IVB or Bank Hapoalim for the years in issue.

came from Living Better. Over the next 5 months, petitioner deposited an additional $198,330. In total, $223,330 was deposited into the Abe-Sylvia account at Bank Hapoalim be transferred to the Cayman Islands' branch. Petitioner used the Cayman Islands' branch to invest in foreign funds being offered by Bank Hapoalim, primarily Eurodollars. The Cayman Islands' branch offered an interest rate approximately one-half to 1 percent higher than the interest rates offered by U.S. banks. Bank Hapoalim did not generate a Form 1099 for funds deposited with its Cayman Islands' branch. During 1980, 1981, and 1982, petitioner earned interest income from his investment at Bank Hapoalim in the amounts of $16,349, $131,491, $137,007, respectively.

Nearly all of the amounts earned in the Bank Hapoalim accounts during the years 1980 through 1982 were either reinvested into the accounts from which they came or directly deposited into Living Better or Lauren Beth. Between the time when the accounts at Bank Hapoalim were opened in 1982, a total of $726,487 was disbursed from the accounts at Bank Hapoalim. Of the $726,487 disbursed, $103,254 was transferred to Living Better, and $219,274 was transferred to Lauren Beth.

Petitioner also willfully failed to report the interest income earned in Living Better's account at IVB and at Bank Hapoalim on his Federal income tax returns for the years 1979 through 1982.

On June 3, 1985, following a 5-day jury trial, petitioner was convicted on four counts of tax evasion for the years 1979, 1980, 1981, and 1982, and four counts of making and subscribing to false income tax returns for the same years. The conviction relates to his failure to report investment income earned by Living Better at IVB and Bank Hapoalim, and not to his failure to report the income from his lending activities.

OPINION

Issue 1. Disregard of Corporations

The first issue for decision is whether Lauren Beth and Living Better should be disregarded for Federal income tax purposes. Respondent contends that, for the purposes of the investment income earned by Living Better, the corporation should be disregarded and the income attributed to petitioner individually. On this point, petitioner agrees with respondent. Inexplicably, respondent contends, however, that for purposes of any income or losses relating to the lending activities conducted by Living Better, the corporation should be recognized as a separate and distinct entity from petitioner. On this point, the parties disagree.

Generally, a corporation, including one wholly owned by one shareholder, is a taxpayer separate and distinct from that shareholder. New Colonial. Co. v. Helvering, 292 U.S. 435, 442 (1934); Burnet v. Commonwealth Improvement Co., 287 U.S. 415, 419-420 (1932). A corporation is to be respected as a taxable entity separate and distinct from its owners where the corporation either is formed for a business purpose or carries on a business purpose after the corporation is formed. Moline Properties, Inc. v. Commissioner, 319 U.S. 436, 438-439 (1943). The corporate business purpose or the quantum of business activity required for recognition of the separate existence of the corporation is generally rather minimal. Hospital Corp. of America v. Commissioner, 81 T.C. 520, 579, 580 (1983); Strong v. Commissioner, 66 T.C. 12, 24 (1976), affd. without published opinion 553 F.2d 94 (2d Cir. 1977). The general rule is that a taxpayer, having chosen the advantages of a corporation in which to do business, must also accept the disadvantages of that choice. Higgins v. Smith, 308 U.S. 473, 477 (1940).

However, there is an exceptio to the general rule where the corporation will not be recognized for Federal income tax purposes. Ogiony v. Commissioner, 617 F.2d 14, 16 (2d Cir. 1980), affg. and remanding T.C. Memo 1979-32; Noonan v. Commissioner, 52 T.C. 907, 910 (1969), aff'd per curiam 451 F.2d 992 (9th Cir. 1971). In circumstances where the

corporation is merely a passive dummy or is used solely for tax avoidance purposes, the corporate form will be disregarded. Jackson v. Commissioner, 233 F.2d 289, 290-291 (2d Cir. 1956), affg. 24 T.C. 1 (1955); Strong v. Commissioner, supra. at 22; Marcus v. Commissioner, T.C. Memo 1992-234.

We find that the situation in these consolidated cases falls within the exception to the general rule. Based on the record before us, we conclude that Living Better and Lauren Beth were used during the years in issue solely as vehicles for petitioner to avoid paying Federal income taxes. The corporations were nothing more than bank accounts that petitioner used to fraudulently hide his income from the Government. *See*, Marcus v. Commissioner, supra. Petitioner never considered the corporations separate and distinct entities form himself. The corporations never filed Federal income tax returns and, as to the State, they claimed to be inactive. Petitioner never observed any corporate formalities. He moved money back and forth among the corporate accounts and his personal accounts, paying business and personal expenses from either.

Furthermore, we conclude that respondent's attempt to disregard the corporation only with respect to the investment income is untenable. We have found no cases, and respondent has cited no cases, where a corporation was to be disregarded only for certain business activities and only for selected years. We are unwilling to hold that with respect to a single bank account some of its earnings are personal to the major stockholder and some are corporate.

Issue 2. Trade or Business of Lending Money

Having concluded that the corporations should be disregarded for tax purposes, the second issue for decision is whether petitioner was in the trade or business of lending money during the years 1979 through 1982.

Section 166(a) allows a deduction for a business bad debt that becomes worthless during the taxable year. Section 166(a)(2), which defines nonbusiness debt, by implication defines a business debt as a debt created or acquired in connection with a trade or business of the taxpayer, or a debt the

loss from the worthlessness of which is incurred in the taxpayers' trade or business.

For petitioner to be entitled to a business bad debt deduction, he must first establish that he was in the trade or business of lending money during the years in question. This Court has held that a trade or business of lending money is limited to those "exceptional" situations where the taxpayer's lending activities are "so extensive and continuous as to elevate that activity to the status of a separate business." Imel v. Commissioner, 61 T.C. 318, 323 (1973); Sales v. Commissioner, 37 T.C. 576, 580 (1961); Rollins v. Commissioner, 32 T.C. 604, 613 (1959)\, affd. 276 F.2d 368 (4th Cir .1960).

Some of the factors which have been considered in determining whether a taxpayer is engaged in the trade or business of lending money include: The total number of loans made; the time period over which such loans were made; the adequacy and nature of the taxpayer's records; whether the loan activities were kept separate and apart from the taxpayer's other activities; and whether the taxpayer sought out the lending business. Ruppel v. Commissioner, T.C. Memo 1987-248; McCrackin v. Commissioner, T.C. Memo 1984-293. We have also considered the amount of time and effort expended in pursuit of the lending activity and the relationship between the taxpayer and his debtors. *See*, Zivnuska v. Commissioner, 33 T.C. 226, 237-238 (1959); Fuller v. Commissioner, 21 T.C. 407, 412-413 (1953); *see also* United States v. Henderson, 375 F.2d 36, 41 (5th Cir. 1967).

We find that the number of loans and the amounts advanced by petitioner are indicative of one in the trade or business of lending money. Not including the loans to Mr. Lipschutz, Mr. Tuchinsky, and Control, between the years 1976 and 1986, petitioner made approximately 55 separate loans, involving approximately $1,200,000. Between 1979 and 1982, again not including the loans to Mr. Lipschutz, Mr. Tuchinsky, and Control, petitioner was still able to make approximately 15 other loans. Over the same time, petitioner advanced nearly $750,000 just to Mr. Tuchinsky, his corporations, and Mr. Lipschutz.

Respondent argues that petitioner's failure to maintain comprehensive records of his lending business demonstrates that he was not in the trade or business of lending money. We agree that petitioner's records with respect to his lending activities are inadequate and disorganized. He did not maintain separate books of his lending activities. Relying on petitioner's records, we are unable to determine the total amount of his income or losses for the years 1979 through 1982. Yet, the records are sufficient for us to reasonably determine the extensiveness of petitioner's lending activities. The records maintained by petitioner are voluminous. On the whole, they do demonstrate a long history of lending money. In light of the other factors, we do not find petitioner's failure to maintain accurate records dispositive on this issue.

Although petitioner did not advertise his lending services to the general public, he did actively seek opportunities. He was known in the community as an individual willing to make loans to those unable to qualify for bank loans. Petitioner received referrals from bankers, title companies, his lawyer, and frequently from "bird-doggers".

Moreover, lending money was clearly petitioner's primary business activity during the late 1970s and early 1980s. Petitioner devoted approximately 40 to 50 hours per week to his lending activities. Most of petitioner's working day was spent generating loans or collecting on loans already made.

The lack of any relationship between petitioner and those he lent money to is another indication that he was in the trade or business of lending money. Petitioner was not related to any of the individuals who received money from him, and he did not have an interest in any of the companies that received money from him, other than that of a creditor.

Based on the foregoing, we conclude that petitioner was in the trade or business of lending money between 1979 and 1982.

Issue 3. Claimed Bad Debt Losses

The third issue for decision is whether petitioner actually incurred any bad debt losses and, if so, in what amounts. A bad debt is deductible in the taxable year during which the debt becomes wholly or partially worthless. Sec. 166(a). The burden of proving that the debt is worthless and the year the debt became worthless is on the taxpayer. Rule 142(a); Mueller v. Commissioner, 60 T.C. 36, 41 (1973), affd. in part, revd. in part and remanded 496 F.2d 899 (5th Cir. 1974). There is no standard test or formula for determining the worthlessness of a debt within a given taxable year; the determination must depend upon the particular facts and circumstances of each case. Crown v. Commissioner, 77 T.C. 582, 598 (1981). However, it is generally accepted that the year of worthlessness is fixed by identifiable events that form the basis of reasonable grounds for abandoning any hope of recovery. Id. at 598; Federated Graphics Cos. v. Commissioner, T.C. Memo 1992-347.

We will first address the worthlessness of the Tuchinsky corporate loans. Petitioner contends that the Tuchinsky corporate loans were worthless in the years the businesses receiving the loans ceased operation, as stated by Mr. Tuchinsky in his revised affidavit. Respondent argues that petitioner has failed to prove either that the corporate loans to Mr. Tuchinsky are worthless, or even when they became worthless. Respondent contests the accuracy of the revised affidavit.

There is no need for us to address the accuracy of either of the Tuchinsky affidavits. We find that petitioner failed to demonstrate that he has incurred any loss on the Tuchinsky corporate loans. One reason is that petitioner commonly received collateral in the form of stock of a Tuchinsky corporation other than the corporation actually receiving the loan. Where a creditor takes collateral or otherwise secures a loan, there can be no worthlessness of the debt until the security itself becomes worthless. Orrell v. Commissioner, T.C. Memo 1979-129; Jessup v. Commissioner, T.C. Memo 1979-289; *see* Hunt v. Commissioner, 33 B.T.A. 946, 950-951 (1936); 8 Mertens, Law of Federal Income Taxation, sec. 30.80 at 208-209 (1989 rev.). Petitioner claimed losses on loans to the Tuchinsky corporations in the total sum of $132,599. If the

Tuchinsky corporate loan losses are only as much as petitioner claims, there is no evidence that petitioner actually suffered any loss. Mr. Tuchinsky listed the collateral held by petitioner as having a total value of $187,000, which would eliminate any loss by petitioner. We note that petitioner has failed to adequately explain why Mr. Tuchinsky stated that he owed $490,000 to petitioner in 1989.

Petitioner argues that we should reject Mr. Tuchinsky's April 1989 letter as a self-serving attempt to inflate the value of the collateral and, accordingly, to lower the amount of his total debts. Based on the evidence, it appears that the value assigned by Mr. Tuchinsky to petitioner's collateral was less than the actual market value. One month later, petitioner was able to sell stock in Amglo Industries, which Mr. Tuchinsky valued at $37,000, for over $56,000.

We also find that the majority of petitioner's testimony with respect to the Tuchinsky loans is not credible. Petitioner seemed to frequently forget repayments made by Mr. Tuchinsky. Petitioner stated that he was not paid by Mr. Tuchinsky. Yet, between 1979 and 1982, he received at least $102,679, not including the $24,200 from MM. When asked to explain the discrepancy, petitioner stated that the $102,679 in payments related to other loans, but failed to produce evidence of other such loans and simply ignored the $24,200 MM payment.

We next turn to the question s to whether the Control loan was worthless. Petitioner claims that, in retrospect, after evaluating his legal claim, the Control loan became worthless in 1980 when his case against Morgan was originally dismissed. We conclude that petitioner's debt to Control became worthless when the Pennsylvania Supreme Court denied his petition for review in 1982. Until such time petitioner had a reasonable prospect of recovery.

The debt was not rendered worthless merely because petitioner did not attempt to collect his loan from Control., as contended by respondent. Legal action is not required where all circumstances indicate that a debt is worthless and uncollectible and that legal action to enforce payment would in all probability

not result in the satisfaction of execution of a judgment. Sec. 1.166-2(b), Income Tax Regs. While we have some doubts in this area, petitioner did expend substantial sums of money to pursue a legal action against Morgan in an attempt to collect from them. Petitioner chose not to initiate collection activities against Control because he felt to do so would be futile. There is no evidence that petitioner's decision in this regard was unreasonable or unwarranted, although his reasons for not proceeding against Control were left unexplained.

Issue 4. Claimed Theft Losses

The fourth issue is whether petitioner incurred a theft loss on the loans to Mr. Lipschutz. Section 165 allows as a deduction a theft loss sustained during the taxable year and not compensated for by insurance or otherwise. Sec. 165(a), (c)(3). Section 165(e) provides that a deduction for such loss shall be treated as sustained in the taxable year in which the taxpayer discovered the loss. Sec. 1.165-8(a)(2), Income Tax Regs. A loss is considered to be discovered when a reasonable person in similar circumstances would have realized the fact that a loss due to theft had occurred. Cramer v. Commissioner, 55 T.C. 1125, 1134 (1971).

The issue of whether a theft loss occurred must be determined under the laws of the State or other jurisdiction wherein the loss was allegedly sustained. West v. Commissioner, 88 T.C. 152, 162 (1987); Paine v. Commissioner, 63 T.C. 736, 740 (1975), affd. without published opinion 523 F.2d 1053 (5th Cir. 1975); Farber v. Commissioner, T.C. Memo 1987-267. The nature of a theft, whether it be larceny, embezzlement, obtaining money by false pretense, or other wrongful deprivation of property of another, is of little importance provided it constitutes a theft. Edwards v. Bromberg, 232 F.2d 107, 111 (5th Cir. 1956); Monteleone v. Commissioner, 34 T.C. 688, 692-693 (1960); sec. 1.165-8(d), Income Tax Regs.

Pennsylvania law defines "theft by deception", in relevant part, as follows:

> A person is guilty of theft if he intentionally obtains or withholds property or another by deception. A person deceives if he intentionally:
>
> (1) creates or reinforces a false impression, including a false impression as to law, value, intention, or other state of mind * * *

18 Pa. Cons. Stat. Sec. 3922(a) (Purdon 1983).

A theft by deception occurs if an individual induces another to lend him money, with no intention of repaying that money. E.g., Commonwealth v. Atwood, 411 Pa. Super. 137, 601 A.2d 277, 286 (1991); Commonwealth v. Edwards, 399 Pa. Super. 545, 582 A.2d 1078 (1990).

. A theft loss is deductible regardless of whether the alleged theft is prosecuted so long as there was an illegal taking of property under the laws of the State where the loss occurred. Viehweg v. Commissioner, 90 T.C. 1248, 1253 (1988); Bagur v. Commissioner, 66 T.C. 817 (1976), remanded 603 F.2d 491, 501 (5th Cir. 1979). A criminal conviction is not a necessary element of the taxpayer's proof in this Court. Monteleone v. Commissioner, supra. at 694.

Respondent disputes petitioner's claim of a theft by Mr. Lipschutz. Respondent points to the numerous discrepancies in the documents provided by petitioner, and his demonstrated lack of credibility. Respondent concludes that petitioner must have been an active participant in some scheme of Mr. Lipschutz' and not a victim, as he claims. We do share respondent's skepticism with respect to the Lipschutz loans. However, there are many aspects of petitioner's loans to Mr. Lipschutz that do make sense.

In these cases, we have more than self-serving statements of petitioner and the conflicting documents. Mr. Berk and, in particular, Mr. Lipschutz, confirmed essential elements of petitioner's claim. Mr. Lipschutz admitted borrowing money from petitioner using as security fraudulent leases and nonexistent or fully collateralized equipment. He conceded that when he borrowed the money, he did so with no

exception or ability to repay the amounts borrowed. With regard to the equipment, at one point, Mr. Lipschutz stated on cross-examination:

> I am trying to say that a lot of these transactions [petitioner] was -- unfortunately he had thought that he had collateral on this equipment, but a lot of the times the equipment was never purchased, the money was used for something else, or the equipment was already owned by PERC and already had a lien on it from the banks.

The remainder of Mr. Lipschutz' testimony makes it clear that when he stated "a lot of the times", he meant all the time. Respondent has offered no plausible reason for us to disregard Mr. Lipschutz' testimony on this point.

We found Mr. Berk to be a credible and trustworthy witness. Mr. Berk, who has been practicing law in the Philadelphia area for nearly 50 years, was petitioner's attorney during the relevant years. Mr. Berk further corroborated Mr. Lipschutz' testimony and confirmed many of the key elements of petitioner's claim. In particular, in late 1982, Mr. Berk stated that he undertook an extensive investigation of Mr. Lipschutz. As a result of his investigation, he discovered that equipment petitioner assumed he owned as security was either nonexistent, owned by other entities, or already fully collateralized.

Based on the record, we find and hold that there was a theft by Mr. Lipschutz under Pennsylvania law.

Having concluded that a theft occurred, we must determine the year that the theft was discovered. Respondent contends that, assuming there was a theft, it was not confirmed or discovered until 1983. Respondent emphasizes that the Puritan letter, which states that seven of the respirator serial numbers were fraudulent, was not received until February 1983 and that the agreement, in which Mr. Lipschutz admitted owing Lauren Beth $415,000, was also not signed until February 1983. Any loss from theft shall be treated as sustained during the taxable year in which the taxpayer discovers the loss.

Cramer v. Commissioner, supra.; sec. 1.165-1(d)(3), Income Tax Regs. We do not find the Puritan letter dispositive. Mr. Berk's investigation into the accuracy of the serial numbers was only one part of his total investigation conducted on behalf of petitioner. Mr. Berk credibly testified that he discovered in late 1982 that petitioner had been swindled by Mr. Lipschutz. The agreement to pay the money back just happened to be signed in 1983. Accordingly, we conclude the theft regarding the loans was discovered in 1982. The loss with respect to the CDs are not deductible in 1982 as the transactions did not occur until 1983.

We must now decide the amount of the loss suffered. Once again, petitioner appears to have overlooked repayments made on his loans. While we find that petitioner lent $468,810 to Mr. Lipschutz between 1979 and 1982, we also find that Mr. Lipschutz repaid $131,875[20] to petitioner, resulting in a loss of $336,935.

We find that the remainder of respondent's arguments denying the theft loss have no merit.

Issue 5. Whether Petitioner 's Losses Offset Income

The last issue for decision is whether the losses from the Control and Lipschutz transactions are sufficient to offset petitioner's earnings from his lending activities and his investments. Petitioner concedes that the earnings from his lending activities cannot be determined. However, he argues that his losses on the Control and Lipschutz loans are so large as to completely -- or nearly completely -- offset earnings from his investments and lending activity, whatever that income may be.

Deductions are strictly a matter of legislative grace. New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934). The taxpayer bears the burden of proving that the Commissioner's determination in the statutory notice of deficiency is erroneous. Rule 142(a); Welch v. Helvering, 290 U.S. 111 (1933).

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20 The $131,875 is the sum of the $13,125 payment under the lease assignment, the $35,000 payment on July 27, 1981, and additional payments $63,750 and $20,000 during the first week of July 1982.

Section 6001 requires that every person liable for any tax shall keep such records, render such statements, make such returns and comply with such rules and regulations as the Secretary may from time to time prescribe. Section 1.6001-1, Income Tax Regs., provides that any person subject to tax shall keep such permanent books of account or records as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information. *See*, DiLeo v. Commissioner, 96 T.C. 858, 867 (1991), affd. 959 F.2d 16 (2d Cir. 1992). The records required shall be kept accurately, but no particular form is required for keeping such records. Sec. 1-6001-1, Income Tax Regs.

Petitioner has submitted records of his lending activities during the 1970s and 1980s. Approximately 71 loan files relate to what petitioner considered to be very profitable loans. However, these loan files are disorganized and in complete disarray. From these loan files it is impossible to determine the amount of income petitioner earned. Petitioner has also introduced evidence of other loans that he made during the same years. The record with respect to these particular loans is significantly better. From these records, we are able to determine that petitioner suffered large losses.

Petitioner is required to maintain records establishing his gross income, not just his losses. Sec. 600.1; sec. 1.6001-1, Income Tax Regs. Petitioner, either consciously or due to inadequate record keeping, has failed to submit records from which his gross income could be determined. Without being able to determine petitioner's gross income, we are unable to conclude that petitioner's losses offset such income. For us to conclude otherwise would be no more than mere speculation on our part. Therefore, we conclude that petitioner has failed to meet his burden of proof, and we sustain respondent's determinations.

We note in closing that we find it very peculiar that petitioner's records of transactions from which he concedes he has earned substantial income are incomplete and in disarray while his records from which he claims offsetting losses are

complete, at least complete enough for us to reasonably determine that a loss was incurred.

To reflect the foregoing and concessions made by petitioner,

Decision will be entered

under Rule 155.

UNITED STATES TAX COURT
Washington, D.C.

ABE SEROT,	)	
	)	
Petitioner(s)	)	
	)	
v.	)	Docket No. 13904-90
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

DECISION

Pursuant to the determination of the Court as set forth in its T.C. Memo 1994-532, filed on October 24, 1994, it is hereby

ORDERED AND DECREED that there are deficiencies in Federal income tax and additions to the tax due from petitioner for the years 1979 through 1982 as follows:

		Additions to Tax		
Year	Deficiency	§6653(b)	§6653(b)(1)	§6653(b)(2)
1979	$16,791	$ 8,395	--------	------
1980	40,156	20,078	--------	------
1981	81,299	40,649	--------	------
1982	67,428	--------	$33,714	50% of the interest due on the under-payment of $67,428[1]

/s/Howard A. Dawson, Jr.
Howard A. Dawson, Jr.
Judge

Entered: Jan 10 1995

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[1] The fraud addition to tax for 1982 is codified under section 6653(b)(1) and (2).

UNITED STATES TAX COURT
Washington, D.C.

ABE SEROT,	)	
	)	
Petitioner(s)	)	
	)	
v.	)	Docket No. 25391-92
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
	)	
Respondent.	)	

DECISION

Pursuant to the determination of the Court as set forth in its T.C. Memo. 1994-532, filed on October 24, 1994, it is hereby

ORDERED AND DECREED that there are deficiencies in Federal income tax due from petitioner for the years 1985 and 1986 in the amounts of $7,086 and $4,419, respectively.

/s/ Howard A. Dawson,Jr.
Howard A. Dawson, Jr.
Judge

Entered: Jan 10 1995